

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 AEGEAN MARINE PETROLEUM S.A.,

11 Plaintiff,

12 v.

13 M/V KAVO PLATANOS, her tackle, boilers,
apparel, furniture, engines, appurtenances, etc.,

14 and

15 Certain Bunkers on board the M/V KAVO
16 PLATANOS,

17 Defendants *in rem*,

18 and

19 CANPOTEX SHIPPING SERVICES LTD.,
et al.,

20 Defendants and Garnishee.
21

IN ADMIRALTY

Case No. 15-CV-00172-RAJ

**MOTION TO DISMISS, TRANSFER
OR STAY**

NOTING DATE: JUNE 5, 2015

22 **I. INTRODUCTION AND RELIEF REQUESTED**

23 Defendants Canpotex Shipping Services Ltd. (“Canpotex”), Indy Maritime S.A., and
24 Gordomichalis Maritime SA (collectively, “Defendants”) are in danger of paying twice for
25 the same *single* delivery of fuel—once to plaintiff Aegean on a maritime lien theory and a
26 second time to ING Bank, successor to the interests of global bunkers broker OW Bunker

MOTION TO DISMISS, TRANSFER OR STAY- 1
(CASE NO. 15-CV-00172-RAJ)

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981

1 Group, under a contract. Defendants therefore ask this Court to provide a simple procedural
2 remedy to a complicated legal dilemma, seemingly one of first impression, in order to
3 prevent exposing Defendants to two lawsuits, two judgments, and two potential payments for
4 a *single* delivery of bunker fuel. Therefore, the Court should dismiss, transfer, or stay this
5 case to avoid inconsistent results and the possibility of improper double exposure.

6 Canpotex, as charterer of the M/V KAVO PLATANOS, arranged with OW Bunker
7 (U.K.) Ltd., a subsidiary of the global bunkers broker OW Bunker Group, for a bunker fuel
8 delivery to the ship. OW Bunker (U.K.) Ltd. arranged for plaintiff Aegean Marine
9 Petroleum S.A. (“Aegean”) to provide the physical fuel delivery. Canpotex would like to see
10 that the bunkers are paid for. To that end, Canpotex has deposited into this Court’s registry
11 money sufficient to satisfy the cost of the bunkers and OW’s broker’s markup.

12 However, multiple OW Bunker Group entities have filed for bankruptcy in
13 Connecticut. OW Bunker Group has assigned its interest in OW Bunker (U.K.) Ltd.’s
14 outstanding contracts to ING Bank, and ING Bank is collecting sums allegedly owed to OW
15 Bunker from vessel operators and charterers such as Canpotex for contracted bunker sales.
16 And physical fuel suppliers such as Aegean have asserted lien claims arising from those
17 same bunker sales. But despite this Court’s order requiring all parties with claims arising
18 from the relevant fuel delivery to appear, OW/ING Bank¹ has refused to appear and represent
19 its interests in this proceeding. Because OW/ING Bank has chosen not to appear before this
20 Court, Defendants face the all-too-real possibility that they may be required to pay for a
21 single fuel delivery two times: (1) \$463,050 to Aegean under its various maritime lien and
22 attachment theories and (2) \$466,650 (Aegean’s invoice plus OW’s broker’s fee) to OW/ING
23 Bank, on contract theories.

24
25 ¹ Because OW Bunker (U.K.) Ltd. has assigned its rights to collect under outstanding
26 contracts to ING Bank, as discussed below, Defendants will refer to “OW/ING Bank” for
convenience.

1 This Court should prevent the “substantial risk”² that Defendants “incur double,
2 multiple, or otherwise inconsistent obligations”³ in any one of three ways:

3 (1) dismiss this matter due to Aegean’s failure and inability to join OW/ING Bank, an
4 indispensable party under CR 19;

5 (2) transfer this matter to the consolidated docket for the numerous related and
6 essentially identical actions, all tied to local bunkers deliveries brokered by Denmark’s now-
7 bankrupt bunkers broker OW Bunker, currently before Judge Caproni in the United States
8 District Court for the Southern District of New York; or,

9 (3) stay this matter pending further developments and clarifications from the
10 numerous related actions in the United States District Court for the Southern District of New
11 York and the OW bankruptcy proceeding in the United States Bankruptcy Court in
12 Connecticut.

13 II. FACTS

14 A. Canpotex purchased bunkers supplied by Aegean under a 15 contract with OW Bunker (U.K.) Ltd.

16 Canpotex Shipping Services Ltd. chartered the M/V KAVO PLATANOS from Indy
17 Maritime SA, the Vessel’s owner, for cargo service.⁴ On October 17, 2014, Canpotex
18 arranged with OW Bunker (U.K.) Ltd. to have approximately 900 metric tons of bunker fuel
19 delivered to the KAVO PLATANOS at Vancouver, British Columbia. OW’s Sales Order
20 Confirmation is attached as Exhibit A to the Declaration of David R. Boyajian, filed
21 herewith. OW Bunker contracted with plaintiff Aegean Marine Petroleum S.A. to provide
22 that fuel to the Vessel.

24 ² FED. R. CIV. P. 19(a)(1)(B)(ii).

25 ³ *Id.*

26 ⁴ Defendant Gordomichalis Maritime SA was the Vessel’s manager at the time.

1 OW Bunker held itself out to be a leading global independent marine fuel (bunker)
2 company with operations in 29 countries, acting as a physical distributor and reseller of
3 marine fuel. It operated a fleet of around 30 bunker vessels and provided risk management
4 solutions to control costs and protect against market fluctuations. According to OW's
5 receiver, OW Bunker was the second largest listed company in Denmark in 2013, with
6 annual revenue of \$17 billion.⁵ The Aegean Marine Petroleum Network, according to
7 Aegean's own marketing materials, "is the largest independent physical supplier in the
8 world" of marine petroleum products.⁶

9 Pursuant to the OW-Aegean agreement, Aegean delivered approximately 900 metric
10 tons of bunker fuels to the Vessel at the port of Vancouver, B.C. on October 22, 2014. The
11 bunker delivery receipt attached as Exhibit 2 to Aegean's complaint confirms same. Aegean
12 then issued its invoice No. V242 to the bunkers broker, OW Bunker, on October 31, 2014,
13 for \$463,050—\$454,050 plus a \$9,000 charge for barging. That invoice is attached to
14 Aegean's Complaint as Exhibit 3.

15 OW Bunker, in turn, issued Invoice No. 24-30922 to Canpotex Shipping Services
16 Ltd. for \$466,650, presumably Aegean's delivery price (including barging) plus a \$3,600
17 broker's fee. OW Bunker's Invoice No. 24-30922 is attached as Exhibit B to the Boyajian
18 Dec. (Canpotex has used this greater amount invoiced from OW Bunker to calculate the
19 amount it has deposited into this Court's registry—\$494,013.00 (*i.e.*, \$466,050 plus accrued
20 interest at 6%).)⁷

23 ⁵ See pwc's O.W. Bunker & Trading A/S Notice Page, [www.pwc.co.uk/business-](http://www.pwc.co.uk/business-recovery/administrations/owbunker.jhtml)
24 [recovery/administrations/owbunker.jhtml](http://www.pwc.co.uk/business-recovery/administrations/owbunker.jhtml) (last visited May 7, 2015).

25 ⁶ See Aegean's Main Web Page, www.ampni.com (last visited May 7, 2015).

26 ⁷ Canpotex has discovered that it based the calculation of the amount deposited off the
erroneous number \$466,050 as opposed to the invoiced amount of \$466,650. Canpotex is
willing to deposit an additional \$636.00 to cover that amount plus 6% interest.

1 **B. The global OW Bunker Group collapsed into insolvency.**

2 Shortly after Canpotex received the OW Bunker invoice, and before Canpotex paid it,
3 Aegean sent an undated “Notice to Pay” to “the owners and operators of the M/V KAVO
4 PLATANOS” stating as follows:

5 We are the physical suppliers of the [900 metric tons of fuel oil
6 delivered at Vancouver] to your vessel. . .

7 The supply was arranged by OW Bunker Group, who as you
8 probably know have collapsed and filed for insolvency and
9 restructuring. . .

10 With the collapse of OW Bunker we hereby call on you to pay the
11 sum of US\$454,050 by return to our bank account. . .

12 In the unlikely event that OW pays for the supply, we shall notify
13 you immediately. Any funds you have paid to us will be returned
14 to you.

15 * * * * *

16 We regret this situation, and we hope you will understand the need
17 for us to request direct payment. . .

18 Aegean’s Notice to Pay is attached as Exhibit C to the Boyajian Dec. Aegean’s
19 Notice to Pay went on to threaten legal action against the ship if the ship operator
20 failed to pay Aegean rather than OW Bunker. Aegean’s Notice to Pay requested that
21 payment be made via “JP Morgan Chase Bank, New York” and provides account
22 routing details. *Id.* According to Aegean’s website, Aegean has an office at 299 Park
23 Avenue, 2nd Floor, New York, NY, USA 10171.⁸ Aegean’s Notice to Pay correctly
24 cited the financial collapse of OW Bunker, which filed Chapter 11 reorganization
25 (Bankruptcy Petition #14-51720) on November 13, 2014, in the U.S. Bankruptcy
26 Court in Connecticut. The OW bankruptcy docket is attached as Exhibit D to the
Boyajian Dec.

⁸ See Aegean’s Web Page: www.ampni.com (follow “Sales Offices” hyperlink) (last visited May 7, 2015).

1 **C. OW Bunker (U.K.) Ltd. assigned its rights to any and all**
2 **receivables arising from bunker sales to ING Bank.**

3 On December 19, 2013, the OW Bunker Group entered into an English
4 Omnibus Security Agreement with ING Bank N.V. (ING). Under that agreement,
5 ING acts as agent for a syndicate of lenders to the OW Bunker Group and OW
6 Bunker Group assigned and charged to ING all rights, title, and interest in its third
7 party and intercompany receivables, both current and future. OW Bunker (U.K.) Ltd.
8 (the particular OW entity with which Canpotex and Aegean contracted) is one of the
9 entities that have submitted to the ING Bank security interest. OW's receiver
10 is, accordingly, going out and collecting all of the receivables on behalf of ING Bank;
11 therefore, for the purposes of collecting on outstanding bunker sales debts, ING Bank
12 is OW.⁹

13 Although Aegean's Notice acknowledges the regrettable situation that
14 Defendants find themselves in, Defendants are not alone. Under federal maritime
15 law, Canpotex is contractually obligated to pay or satisfy lien claims asserted against
16 the ship arising from bunkers purchases as charterer of the M/V KAVO PLATANOS.
17 Not surprisingly, with the collapse of a massive, global bunkers brokering network
18 like the OW Group, numerous vessels owners and charterers find themselves in a
19 practically identical position as Canpotex, caught between claims of OW/ING Bank
20 and OW Bunker's various locally contracted suppliers, like Aegean. This has
21 resulted in litigation around the world, including in the United States. In the United
22 States, each and every one of those matters appears to be making its way to a single

23 _____
24 ⁹ See pwc's O.W. Bunker & Trading A/S Notice Page, www.pwc.co.uk/business-recovery/administrations/owbunker.jhtml (last visited May 7, 2015).

25 The actual English Omnibus Security Agreement is here:
26 www.pwc.co.uk/assets/pdf/ow_bunkers_charge_19_12_13_registration.pdf (last visited May 7, 2015).

1 desk at the United States District Court for the Southern District of New York.

2 **D. Nearly all the related United States actions have been consolidated**
3 **before a single judge in the United States District Court for the**
4 **Southern District of New York.**

5 At least nineteen related interpleader and arrest actions filed in the United
6 States have so far been transferred to and consolidated before Judge Valerie E.
7 Caproni in the United States District Court for the Southern District of New York. A
8 list of those actions is attached as Exhibit E to the Boyajian Dec. Among those
9 actions is the M/V BIRCH 6 case, which was initiated as a vessel arrest action in the
10 United States District Court for the Southern District of Louisiana, but was
11 transferred to the United States District Court for the Southern District of New York,
12 and onto Judge Caproni's consolidated docket, with substituted financial security
13 transferred to and posted with the Clerk of the Court in the United States District
14 Court for the Southern District of New York. The Consent Motion to Transfer and
15 the Order granting same are attached as Exhibit F to the Boyajian Dec. Note also that
16 Canpotex is among the Interpleader plaintiffs already before Judge Caproni. Since
17 last November, Judge Caproni has been unravelling the OW Bunker threads that lead
18 to vessels roaming the far reaches of the globe and the far-flung local fuel suppliers
19 who supplied those vessels under contracts with the several OW entities. The
20 Dockets for all nineteen related OW Bunker/local supplier actions are attached as
21 Exhibit G to the Boyajian Dec.

22 Judge Caproni is sorting out the relative priority of the contract claims by the
23 bankruptcy claimants and the fuel suppliers who assert maritime lien rights against
24 vessels. In fact, counsel for Aegean recently filed a motion for summary judgment
25 with Judge Caproni on behalf of another, similarly situated local fuel supplier. *See*
26 Boyajian Dec, Ex. G, at 1:14-cv-10027-VEC, document 42. Aegean's counsel argues
that the claims of fuel suppliers are superior to the claims against the bankruptcy fund

1 because: (1) there is legal priority of maritime liens over the contract collection
2 claims of ING Bank, and (2) the supplier retains title to the bunker fuel, since OW
3 Bunker never paid the supplier for the fuel delivery. A ruling on that motion should
4 lead to the logical result sought by Canpotex and the other vessel interests, which is
5 to credit against the contract amounts owed OW Bunker the amounts paid to the
6 suppliers/lien claimants in satisfaction of their maritime claims. Judge Caproni has
7 stayed that motion pending further discovery (per bench orders) and some resolution
8 with the Bankruptcy Court in Connecticut over potential consolidation of the various
9 maritime interpleaders and claims before the United States District Court for the
10 Southern District of New York and the OW bankruptcy action before the Bankruptcy
11 Court in Connecticut.¹⁰ There is a May 13, 2015, status conference scheduled before
12 Judge Caproni to address this question as it relates to the consolidated OW Bunker
13 cases.

14 There is also a pending transfer motion in the United States Bankruptcy Court in
15 Connecticut to transfer the OW Bunker proceedings to the Southern District of New York, in
16 their entirety. Ex. D, docket entry #229. This transfer motion now appears somewhat closer
17 to resolution. There is a hearing scheduled for May 27, 2015, on the motion to transfer to the
18 United States District Court for the Southern District of New York and the related consent
19 agreements. Ex. D, docket entry dated 4/29/2015. Regardless, Aegean has a presence in
20 Connecticut—Aegean has another office at 22 Thorndale Circle, 3rd Floor, Darien, CT, USA
21 06820.¹¹ Aegean, then, has offices in *both* New York City and Connecticut, but no presence
22 in the Pacific Northwest. The only thing anchoring this matter in this forum is the substitute
23

24 ¹⁰ ING Bank is OW's receiver and, as such, would be the entity likely to attempt to collect on
25 the OW contract debts.

26 ¹¹ See Aegean's Web Page: www.ampni.com (follow "Sales Offices" hyperlink) (last visited May 7, 2015).

1 res—the funds sitting in this Court’s registry. Those funds can be easily transferred, and
2 Defendants stand ready to execute any instructions regarding how the Court would like to see
3 this accomplished.

4 Canpotex wants to pay for the fuel it purchased. That intention is confirmed by
5 Canpotex filing an interpleader action in the United States District Court for the Southern
6 District of New York in which it has asked that Court to allocate funds for fuel purchases to
7 the appropriate parties. *See* Exhibits E & G to the Boyajian Dec., at *Canpotex Shipping*
8 *Services Ltd., et al. v. O.W. Bunker (U.K.) Ltd. et al.*, 1:15-cv-01351-VEC. But Canpotex
9 wants to only pay *once* for the fuel it purchased for the ship.

10 This Court should dismiss, transfer, or stay this case.

11 **III. EVIDENCE RELIED UPON**

- 12 1. The Declaration of David R. Boyajian and the Exhibits attached thereto; and,
13 2. Court records and files therein.

14 **IV. ISSUES PRESENTED**

15 As noted above, this Court should prevent the substantial risk that Defendants incur
16 double, multiple, or otherwise inconsistent obligations arising from competing contract and
17 maritime liens claims related to the same single bunkers delivery in any one of three ways:

18 (1) dismiss this matter due to Aegean’s failure and inability to join OW/ING Bank, an
19 indispensable party under CR 19;

20 (2) transfer this matter to the consolidated docket for the numerous related and
21 essentially identical actions, all tied to local bunkers deliveries brokered by the OW Bunker
22 Group, currently consolidated before Judge Valerie E. Caproni in the United States District
23 Court for the Southern District of New York; or,

24 (3) stay this matter pending further developments and clarifications from the
25 numerous related maritime actions in the United States District Court for the Southern
26 District of New York and the OW bankruptcy proceeding in the United States Bankruptcy

MOTION TO DISMISS, TRANSFER OR STAY- 9
(CASE NO. 15-CV-00172-RAJ)

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981

1 Court in Connecticut.

2 **V. ARGUMENT AND AUTHORITY**

3 Unfortunately, this Court cannot allocate the deposited funds between Aegean and
4 OW Bunker *without* an appearance on behalf of the OW/ING Bank. Without OW/ING
5 Bank's appearance, this Court cannot allocate the deposited funds without exposing
6 Defendants to the risk of paying nearly a half million dollars twice. However, the
7 Connecticut bankruptcy court is working with the United States District Court for the
8 Southern District of New York to see that the parties wind up in a forum that can reach a
9 wholesale equitable solution that will, we expect, protect innocent victims such as Canpotex.
10 OW's interests are obviously represented in the Connecticut bankruptcy proceeding. And
11 OW Bunker entities are making appearances in the United States District Court for the
12 Southern District of New York. So far, both OW USA and OW North America have waived
13 service and appeared in all of the United States District Court for the Southern District of
14 New York cases they are involved in, as has OW Germany. Regardless, based upon
15 the agreement between OW Bunker (UK) Ltd. and ING Bank, it does not matter what OW
16 entities appear in the United States District Court for the Southern District of New York
17 because ING Bank has appeared and is effectively playing its hand in the United States
18 District Court for the Southern District of New York and the OW Bunker Group has assigned
19 all its rights to ING Bank.

20 The critical issue on the claim before this Court is identical to that before Judge
21 Caproni in nineteen (and likely growing) virtually identical matters: How can vessel
22 interests see that both OW/ING Bank and the local supplier get paid what they are owed for
23 the fuel deliveries without the vessel interests having to pay roughly the same amount twice,
24 once to OW/ING Bank in contract and once to the suppliers on a maritime lien theory. To
25 that end, Canpotex has deposited \$494,013.00 into this Court's registry. This represents an
26 amount sufficient to cover the OW Bunker invoice, including OW's markup.

MOTION TO DISMISS, TRANSFER OR STAY- 10
(CASE NO. 15-CV-00172-RAJ)

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Attorneys at Law
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981

1 A. **Maritime precedent prevents double obligations for Defendants**
2 **caught at the intersection of competing maritime lien and contract**
3 **claims arising from the same service.**

4 Courts recognize and protect those who risk facing double exposure from
5 liens of sub-contracted marine service providers. For example, a carrier has a general
6 right to assert a possessory lien against cargo for unpaid freight. *E.g., Osaka Shosen*
7 *Kaisha v. Pacific Lumber Export Co.*, 260 U.S. 490 (1923); *Beverly Hills National*
8 *Bank and Trust Co. v. Compania de Navegacione Almirante, S/A*, 437 F.2d 301 (9th
9 Cir. 1971) (same). But what happens when a cargo shipper pays freight to a
10 transportation intermediary, such as a vessel charterer or a non-vessel-owning
11 common carrier (NVOCC), but that intermediary fails to pay the shipowner
12 performing the ocean carriage?

13 Normally, an unpaid shipowner cannot assert a lien against a third party who
14 has paid freight to a charterer or NVOCC. *The Bird of Paradise*, 72 U.S. 545 (1867);
15 *Goodpasture, Inc. v. M/V POLLUX*, 602 F.2d 84 (S.D.N.Y. 1979); *Berdex Int'l, Inc.*
16 *v. M/V KAPITAN GRISHIN*, 1992 AMC 1096 (N.D. Ca. 1992) (ocean carrier has no
17 lien against cargo for freight not paid by NVOCC where cargo owner had paid
18 freights due to the NVOCC before the cargo owner received notice of the lien from
19 ocean carrier). No lien for subfreights arises for unpaid charter hire unless the
20 shipowner gave actual notice of the lien before the cargo owner paid the subfreights
21 to the intermediary. *Prozina Shipping Co., Ltd. v. Thirty-four Automobiles*, 179
22 F.R.D. 41, 1991 AMC 1329 (D. Mass. 1991).

23 If, on the other hand, the ocean carrier gives notice to the cargo owner **before**
24 the cargo owner pays the delinquent charterer/freight broker, the carrier can demand
25 direct payment from the third-party cargo owner, enforceable by a lien against the
26 cargo. *Hornbeck Offshore Operators, Inc. v. Ferromet Resources, Inc.*, 849 F.Supp.
434 (E.D. Va. 1994); *St. John Marine Co. v. United States*, 1994 AMC 2526

1 (S.D.N.Y. 1994) (enforcing a lien against a sub-charterer that had ignored notice of a
2 lien and paid subfreights to the charterer). “A review of the jurisprudence suggests,
3 in essence, this broad equitable premise: The shipowner has a maritime lien for
4 charter hire on cargo . . . *except* as against a good faith purchaser of the cargo who
5 had paid for it in advance without notice of the shipowner’s rights.” *Toro Shipping*
6 *Corp. v. Bacon-McMillan Veneer Mfg. Co.*, 1966 AMC 2290 (5th Cir. 1966).

7 The Fifth Circuit in *Goodpasture* could easily have been discussing the case
8 before this Court when it said: “[T]he facts of this unfortunate case present a
9 maritime version of the eternal triangle, one in which the difficulties arising between
10 each of the three (or perhaps four or five) actors transcend their relationship to
11 bedevil the others.” *Goodpasture*, 602 F.2d at 84. The problem before this Court is
12 that Canpotex received notice (including, *inter alia*, the Notice to Pay from Aegean)
13 that OW had not paid ***and would not pay*** Aegean ***before*** Canpotex paid OW Bunker.
14 This Court should affect a procedural solution that will allow Canpotex to be treated
15 like all other similarly situated victims of the OW Bunker bankruptcy. Accordingly,
16 Defendants seek three alternative solutions, as discussed further below.

17 **B. The Court should dismiss this case because OW/ING Bank, a**
18 **necessary party, has not been joined.**

19 Despite this Court’s February 20, 2015, Order, OW/ING Bank has not appeared in
20 this lawsuit. Order attached as Exhibit H.¹² In OW/ING Bank’s absence, this Court is
21 unable to resolve this matter without exposing Defendants “to a substantial risk of incurring
22 double, multiple, or otherwise inconsistent obligations . . .” FED. R. CIV. P. 19(a)(1)(B)(ii).
23 OW/ING Bank is therefore an absent but indispensable and necessary party whose presence

24 ¹² OW Bunker was served in accord with this Court’s Order and at other known and
25 related pwc email addresses. The other related email addresses are those for the other listed
26 receivers for OW Bunker (UK) Ltd. Those Proofs of Service are attached as Exhibit I to the
Boyajian Dec.

1 is required by FRCP 19, but Aegean failed to include OW Bunker or ING Bank as a party
2 defendant.

3 “Where a party required under Rule 19 has not been joined, a party may move for
4 dismissal under Rule 12(b)(7).” *Cabrera-Morales v. UBS Trust Co.*, 769 F. Supp. 2d 67, 70
5 (D.P.R. 2011). In *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18 (1st Cir. 2010), the First Circuit
6 explained the purpose of Rule 19 and provided instruction on how to apply the Rule:

7 Parties should be joined, when feasible, if they are “necessary” to
8 the action according to the criteria laid out in Rule 19(a). If a
9 necessary party cannot be joined in the action . . . Rule 19(b) lays
10 out additional criteria for determining whether the party is
11 “indispensable.” If the court finds that party is anything less than
indispensable, the case proceeds without her. If, on the other hand,
the court finds that the litigation cannot proceed in the party’s
absence, the court must dismiss the case.

12 *Id.* at 25 (internal citation omitted). The *Jimenez* Court expanded upon the meaning
13 of “necessary” under Rule 19:

14 The term “necessary” is a vestige of a superseded version of Rule
15 19 and no longer appears in the text. . . . Lest there be any
16 confusion, the word is used as a term of art and signifies
17 desirability rather than actual necessity. Parties are not truly
necessary in the vernacular sense of the word unless and until they
satisfy the terms of Rule 19(b).

18 *Id.* at 25 n.3 (internal punctuation omitted). The term “indispensable” has similarly
19 been removed from the text of Rule 19, but courts still use it as shorthand for whether
20 dismissal under Rule 19(b) is warranted. The “critical question” under Rule 19(b)—
21 and thus the key to whether a party is “indispensable”—is “‘*whether in equity and*
22 *good conscience*’ the action may proceed in [the party’s] absence.” *B. Fernandez &*
23 *Hnos, Inc. v. Kellogg USA, Inc.*, 516 F.3d 18, 23 (1st Cir. 2008) (emphasis added)
24 (quoting FED. R. CIV. P. 19(b)).

25 Rule 19(b) provides four non-exhaustive factors for the trial court to consider in
26

1 determining whether a party is indispensable:

2 (1) the extent to which a judgment rendered in the person's
3 absence might prejudice that person or the existing parties;

4 (2) the extent to which any prejudice could be lessened or avoided
5 by: (A) protective provisions in the judgment; (B) shaping the
6 relief; or (C) other measures;

7 (3) whether a judgment rendered in the person's absence would be
8 adequate; and

9 (4) whether the plaintiff would have an adequate remedy if the
10 action were dismissed for non-joinder.

11 FED. R. CIV. P. 19(b). "Rule 19(b) determinations must be based on fact-specific
12 considerations," and "must be steeped in 'pragmatic considerations.'" *Travelers Indem. Co.*
13 *v. Dingwell*, 884 F.2d 629, 635 (1st Cir. 1989) (quoting Advisory Committee Notes on the
14 1966 Amendments to Rule 19).

15 1. The four Rule 19(b) factors

16 a. Prejudice

17 The first CR 19(b) factor is the extent to which a judgment rendered without
18 OW/ING Bank might prejudice an existing party or OW/ING Bank. FED. R. CIV. P.
19 19(b)(1). If this lawsuit is allowed to proceed without OW/ING Bank, Defendants are still at
20 risk of a subsequent claim by OW/ING Bank based on the Canpotex-OW Bunker contract,
21 seeking payment for the exact same delivery of fuel. Exposure to double liability for a single
22 purchase is the clearest type of prejudice, and is specifically recognized in CR 19(a).

23 The prejudice to Aegean from a dismissal, on the other hand, is negligible. The only
24 jurisdictional hook that brought this case before this Court was the presence of the *res*, the
25 M/V KAVO PLATANOS, within this district. The substitute *res* that was deposited with
26 this Court, however, is far more mobile. This Court could easily dismiss this action and
transfer the substitute *res* to the United States District Court for the Southern District of New
York's Registry. OW/ING Bank has appeared and is appearing in numerous related actions

1 in the United States District Court for the Southern District of New York. Aegean requested
2 that Defendants send payment to a bank in New York. *See* Exhibit C. Aegean has offices in
3 New York. Judge Caproni is adjudicating at least nineteen substantially identical actions in
4 the United States District Court for the Southern District of New York. A dismissal of this
5 action and a transfer of the substitute funds imposes a minimal burden on Aegean and aligns
6 the risk to Defendants of double liability with those seeking resolution of the same issue
7 before Judge Caproni. It also, obviously, provides for more efficient use of judicial
8 resources—the United States District Court for the Southern District of New York is already
9 examining the very issues at play here. The facts in this case and pragmatic considerations
10 favor dismissal.

11 b. Protective provisions

12 Defendants cannot envision protective provisions—beyond the notice to appear
13 included in this Court’s February 20 Order—that might eliminate exposure to potentially
14 double liability. The Court’s Order directing OW/ING Bank to appear, in this case, has not
15 been complied with. Canpotex has sought to protect its interests by affirmatively seeking
16 interpleader relief before Judge Caproni related to OW Bunker sales to other vessels. These
17 factors therefore weigh in favor of dismissal.

18 c. Adequacy of judgment in OW Bunker’s absence

19 A judgment in this Court would be fully adequate only as between Defendants and
20 Aegean. But it would leave Defendants *entirely* at risk of subsequent claims by OW/ING
21 Bank to recover for the same delivery under the Canpotex-OW Bunker fuel delivery/broker
22 contract. This factor, therefore, also weighs in favor of dismissal.

23 d. Adequacy of remedy if action dismissed

24 Aegean’s filing in this jurisdiction was based solely on the temporary presence of the
25 M/V KAVO PLATANOS within the district. But the physical presence of the Vessel no
26 longer anchors this action to this forum. Substitute security has been deposited with this

1 Court in an amount sufficient to satisfy both Aegean's *and* OW/ING Bank's claims, if both
2 can be made parties to a single lawsuit. That appears to be an impossibility here—OW/ING
3 Bank is protected by the bankruptcy stay and has ignored this Court's prior order to appear
4 voluntarily. However, both parties are present in New York. The *res* can be transferred to
5 New York. The parties to this action could follow that *res*. Moreover, the S.D.N.Y. is
6 already working with the United States Bankruptcy Court in Connecticut to create a single
7 forum in which to resolve all the related claims. There is, therefore, a perfectly adequate
8 remedy available in the S.D.N.Y. The availability of an adequate forum in another District
9 Court that can resolve all related and competing claims weighs heavily in favor of dismissal.

10 C. **In the alternative, the Court should transfer this case to a forum**
11 **that can address all claims.**

12 If this Court were not inclined to dismiss this action and encourage Aegean to refile
13 in a forum able to dispose of the competing claims to this single substitute *res*, then the Court
14 should transfer this action in its entirety to the United States District Court for the Southern
15 District of New York. A district court has broad discretion "to adjudicate motions for
16 transfer according to an individualized, case-by-case consideration of convenience and
17 fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v.*
18 *Barrack*, 376 U.S. 612, 622 (1964) (internal citations omitted)).

19 In order for a district court to transfer an action under 28 U.S. Code § 1404, it must
20 make the following two findings: (1) the transferee court is one where the action "might
21 have been brought," and (2) the convenience of the parties and witnesses and the interest of
22 justice favor transfer. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). To
23 determine whether the moving party has met its burden under the second prong, courts
24 consider the following factors: (1) non-moving party's choice of forum; convenience of the
25 parties and witnesses; (2) ease of access to sources of proof; (3) local interest in the
26 controversy; (4) familiarity of each forum with the applicable law; and (5) relative

1 congestion in each forum. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834,
2 843 (9th Cir. 1986) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). Each of
3 these factors weighs in favor of transfer.

4 Aegean's choice of forum was initially dictated only by the temporary presence of the
5 M/V KAVO PLATANOS within the district. But an action against the substitute *res*, which
6 stands in the Vessel's place, can be prosecuted wherever the funds are deposited. As against
7 deposited funds, this particular forum provides no particular benefit, and this action could
8 have been initiated anywhere. As for the parties' convenience, neither Aegean nor
9 Defendants have offices in Washington. But Aegean does have an office in New York (and
10 another in Connecticut), and Canpotex has related interpleader actions pending before the
11 S.D.N.Y. OW/ING Bank has similarly appeared in related action pending before the
12 S.D.N.Y. There are no witnesses or evidence located in Washington to the underlying
13 transactions. Ease of access to proof and the familiarity of the forum with the relevant (and
14 complicated) law weigh most heavily in favor of transfer. New York is a major center of
15 maritime commercial and legal activity, and the United States District Court for the Southern
16 District of New York is a preeminent forum for resolution of maritime law disputes.¹³ As
17 indicated by the number of interpleader and claim actions filed in or transferred to the United
18 States District Court for the Southern District of New York, New York has high interest in
19 this controversy. Relative congestion of court dockets in each forum would not seem to be a
20 factor given the special attention that these consolidated cases are receiving.

21 This case involves the intersection of marine operations carried out on a global scale
22 and the bankruptcy of a multinational petroleum supplier. It appears to be an issue of first
23

24 ¹³ See JUDGE HAIGHT ON THE 225 YEAR HISTORY OF ADMIRALTY PRACTICE IN THE SDNY:
25 An address by the Honorable Charles S. Haight, Jr., Senior United States District Judge of
26 the United States District Court for the Southern District of New York on the 225th
Anniversary of the Court: www.americanmaritimecases.com/assets/SDNY/JUDGE-HAIGHT.pdf.

1 impression as to bunkers brokers, although the cases addressing a carrier's lien on freights
2 make it clear that courts sitting in admiralty protect innocent maritime actors from paying
3 twice on lien and contract claims for the same service. The United States District Court for
4 the Southern District of New York has consolidated its cases in the interest of even-handed
5 resolution and judicial economy. This case ought to join them.

6 **D. In the alternative, this Court should stay this matter while the**
7 **other, likely dispositive pending matters are resolved.**

8 If this Court were to believe that dismissal or transfer are not warranted, then the
9 Court should stay this proceeding pending further developments in both the United States
10 District Court for the Southern District of New York and the Bankruptcy Court in
11 Connecticut. As noted above, Judge Caproni has nineteen nearly identical actions before her,
12 all related to fuel sales brokered by OW entities. Also before that court is a motion for
13 summary judgment, filed by Aegean's counsel, asking for a determination of the relative
14 priority of the bankruptcy debtors as against maritime liens claimants like Aegean. The
15 parties in all nineteen related actions are to appear for a general status conference on May 13,
16 2015, to address this issue and others. A ruling will hopefully be made following the May
17 27, 2015, hearing in the Bankruptcy Court on the motion to transfer that action to the United
18 States District Court for the Southern District of New York and the related consent
19 agreements. Eventually, those two courts will sort out the relationships between the several
20 actions, the several claimants, and the priorities of the several claims to the same money
21 owed for the individual fuel deliveries. If this Court were not inclined to see this action be
22 part of that wholesale resolution, then Defendants ask that this Court stay the current matter
23 pending further developments in the pending matters.

24 ///

26 ///

1 Dated this 11th day of May, 2015.

2 SCHWABE, WILLIAMSON & WYATT, P.C.

3
4 By: s/ David R. Boyajian

5 David R. Boyajian, OSB No. 112582, *pro hac vice*
6 1211 SW Fifth Avenue, Suite 1900
7 Portland, OR 97204
8 Telephone: 503-222-9981
9 *Counsel for Specially Appearing Defendants*
10 *Canpotex Shipping Services Ltd., Indy Maritime*
11 *S.A., and Gordomichalis Maritime SA*
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MOTION TO DISMISS, TRANSFER OR STAY- 19
(CASE NO. 15-CV-00172-RAJ)

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys at Law
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone: 503.222.9981

1 **CERTIFICATE OF SERVICE**

2 I declare under penalty of perjury of the law of Washington State and that on May 11,
3 2015, I electronically filed this document with the Clerk of the Court using the CM/ECF
4 system which will send notification of such filing to the following:

5 J. Stephen Simms - jssimms@simmsshowers.com

6 Christopher W. Nicoll - cnicoll@nicollblack.com

7 Jeremy Jones - jjones@nicollblack.com

8
9
10 By: s/ David R. Boyajian